89-458 (1)

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROYCE BODDIE BADGER,
Petitioner
vs.
UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

W. Michael Maloof
215 North McDonough Street
Decatur, Georgia 30030
(404) 373-8000

Attorney for Petitioner,
ROYCE BODDIE BADGER

93pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT ERRS WHEN IT FAILS TO INSTRUCT THE JURY THAT A PERSON CANNOT FORM A CONSPIRACY WITH A GOVERNMENT AGENT.

II.

WHETHER THE LANGUAGE IN AN ENTRAPMENT INSTRUCTION SUBSTANTIALLY COVERS AN OMITTED CHARGE THAT A PERSON CANNOT CONSPIRE WITH A GOVERNMENT AGENT, SO THAT THE DEFENDANT'S ABILITY TO MAKE A DEFENSE IS NOT IMPAIRED.

III.

WHETHER A DEFENDANT IS DENIED DUE PROCESS OF LAW WHEN HE IS CONVICTED OF CONSPIRING TO POSSESS COCAINE WITH INTENT TO DISTRIBUTE, AND THE GOVERNMENT FAILS TO CHARGE SPECIFICALLY AS TO A ONE-HALF OUNCE AMOUNT OR A FOUR-KILOGRAM AMOUNT, BOTH AMOUNTS AS TO WHICH THERE IS EVIDENCE, AND THE JURY FAILS TO RESOLVE THE LACK OF CLARITY AS TO AMOUNT, AND THE DEFENDANT IS SENTENCED FOR THE GREATER AMOUNT.

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The timely suggestion for rehearing en banc to the United States Court of Appeals for the Eleventh Circuit was denied on June 20, 1989 and is not reported. On April 10, 1989, the United States Court of Appeals for the Eleventh Circuit ruled that petitioner's conviction was affirmed per curiam and is reported at 874 F.2d 820.

On June 13, 1988, a jury in the Northern District of Georgia, found petitioner guilty on conspiracy to possess cocaine with intent to distribute. A decision was not reported.

JURISDICTION

On April 10, 1989, the United States Court of Appeals for the Eleventh Circuit ruled that petitioner's conviction was affirmed per curiam. Within twenty days, petitioner filed a suggestion for re-hearing en banc, which was denied on June 20, 1989. This petition was mailed from Decatur, Georgia on August 18, 1989, and filed within sixty days of June 20,

1989. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The 5th Amendment due process clause provides:

"No person shall be...deprived of life, liberty or property, without due process of law..."

2. 21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this title (21 U.S.C.) shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or the conspiracy.

3. 21 U.S.C. 841(a)(1) provides:

"841(a)...it shall be unlawful for any person knowingly or intentionally - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance..."

4. 8 U.S.C. 3553B provides:

"(b)...The court shall impose a sentance of the kind, and within the range, refered to in in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the sentancing commission in formulating the guidelines that should result in a sentence different from that described."

STATEMENT OF THE CASE

On June 13, 1988, after a jury trial in the District Court of the Northern District of Georgia, Petitioner was convicted of one count of conspiracy to

possess cocaine with intent to distribute in violation of 21 U.S.C. [Appendix p. (7)] and found not guilty of the substantive offenses of possession of cocaine with the intent to distribute and simple possession. He was sentenced to 10 years imprisonment.

On appeal a panel of the court of appeals affirmed the conviction [Appendix p. (2)]. A petition for rehearing en banc was denied [Appendix page (3)]. The following summary is taken from the pleadings and transcript of the proceedings in the District Court of the Northern District of Georgia.

On March 13, 1988, Gregory Leroy James was arrested in south Georgia en route from Florida to Atlanta with four kilograms of cocaine in his car (R3-28). Upon his arrest, he informed police that he was delivering the cocaine to a customer in Atlanta. The police charged James with trafficking in cocaine (R3-35). They then made a deal with James in which James was

promised a lighter sentence if he cooperated with the police (R3-55, R4-48, 53). James agreed to do so, to become a government agent and attempt to deliver the cocaine to his customer in Atlanta.

When James arrived in Atlanta, he was outfitted with a taping device to record the proceedings, and he was briefed extensively by police officers (R3-75, 76). Due to a malfunction, the tape was running while the briefing was going on (R3-76), but had run out before the time the controlled delivery was made (R3-111, R4-18). Because the tape was running, there is a record of James being threatened improperly by the police (R3-111, 112, 114, 116). There is, however, no record of the events involving the controlled delivery to Royce Badger, petitioner in this case (R3-111, R4-18).

James was instructed that he should call his customer, arrange to meet him at the prearranged location without naming the place and, at the meeting, let the customer

voluntarily take the bag of cocaine from the trunk of James' car (R3-106, R3-82, 105). James then made a phone call to petitioner, who agreed to meet him at a restaurant, which, contrary to instructions, James named (R3-82, 105, R3-76, R4-44-46, 94). There is a tape of the telephone call (RE-55, 56), during which petitioner indicated that he did not know what "stuff" James had for him. Petitioner contends that he owed James about $1,500 for one-half ounce of cocaine (R4-89) which he had bought from James about two and one-half weeks previously (R3-118, R4-98, 99). Petitioner contends he paid James $1,200 at the restaurant (R4-95).

Petitioner, along with Dwan Kornegay, met James at the restaurant. When James and Petitioner went to James' car, James removed the bag from the car and handed it to Petitioner (R4-19, 96). Petitioner alleges that James asked him to hold the bag for James (R4-23). As Petitioner

walked away from James' car carrying the bag, police moved in and arrested him. At the moment he realized there were policemen present, Petitioner threw down the gun he was holding but not the bag (R3-85, R4-100). Petitioner testified that he thought his possession of the gun was the reason police were called (R3-85, R4-100).

Petitioner denied any knowledge of the four kilograms of cocaine in James' car. He said that the money he paid James was for a previous purchase of one-half ounce of cocaine (R4-89). He contended he never agreed to pick up anything, but only to pay James money he owed him. He claimed to know nothing of the contents of the bag he held for James (R4-99).

When the charges were given to the jury, defendant's counsel requested two instructions which were denied: (1) That James became a government agent as soon as he made the deal with the police in south Georgia shortly after his arrest, and that a person cannot conspire with a government

agent (R1-27-22, R5-70)[App. p. (13-14)]; and (2) That the jury, if they found Petitioner guilty of either charge, should indicate the amount they found Petitioner guilty of possessing or conspiring to possess: the one-half ounce he had previously bought from James, or the four kilograms which were allegedly being delivered to him at the time of his arrest (R1-27-49).

The jury found Petitioner guilty of conspiring to possess cocaine with intent to distribute, but not guilty of possession of cocaine with intent to distribute. They included charge of simple possession (R1-29). The judge subsequently sentenced Petitioner, per the federal sentencing guidelines, for conspiracy to possess with intent to distribute the four kilograms of cocaine (R1-1).

REASONS FOR GRANTING THE WRIT

I. In affirming the trial court's refusal to charge the jury that a conspiracy can not be formed with a government agent, the Eleventh Circuit has

departed from its usual course of judicial proceedings and decided an important question of federal law which has not been but should be settled by this court.

In order for Badger to present an adequate defense, it was essential that the jury be charged that James became a government informer at the time he made the deal with the police after his arrest and that Badger could not have formed a conspiracy with James after that time. The Eleventh Circuit has held that one cannot conspire with a government informer who secretly intends to frustrate tne conspiracy. United States v. Richardson, 764 F.2d 1514 (11th Cir. 1985).

The indictment did not accuse Badger of conspiring with any person other than Greg James. When James agreed to cooperate with the government, he was no longer subject to punishment for any acts committed commensurate with that agreement.

Badger was entitled to have the jury charged that any conspiracy with James would have ended after James became a cooperating witness. The jury should have been told that they could have taken into consideration any acts by Badger subsequent to James's becoming an agent for the government as evidence of a prior conspiracy. The failure of the trial Court to give this charge limited Badger's closing argument.

In addition, since James did not testify, the jury was put into a position of possibly accepting the conspiracy theory only on the 14th of March. The trial might have had a completely different result had Badger's attorney been allowed to argue that, for the jury to find Badger guilty on the conspiracy count, the government had to prove beyond a reasonable doubt that the conspiracy was already in effect between the dates of March 9 and March 13, before the meeting at the Williams Seafood Restaurant.

The way the charge was given, the jury was allowed to conclude that the conspiracy occurred on the 14th.

This circuit has repeatedly held that government agents and informants cannot be conspirators. U.S. v. Rodriguez, 765 F.2d 1546, 1552 (11th Cir. 1985); U.S. v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984).

Badger respectfully suggests that, since James could not be punished for his activities on March 14, 1988, he could therefore not be a co-conspirator with Badger on that date. Failure to advise the jury of this fact does Badger irreparable harm at trial.

In United States v. Lively, 803 F.2d 1124 (11th Cir. 1986), the court reversed the conviction of the defendant for conspiracy to distribute cocaine due to the trial court's failure to instruct the jury that a government informer cannot conspire with another. The defendant is entitled to have presented instructions relating to a theory of defense for which there is any

foundation in the evidence. United States v. Young, 464 F.2d 160, 164 (5th Cir. 1972), citing Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951).

Following the Stone requirements, the charge requested in this case is clearly correct. The disagreement arises over the question whether the requested instruction was substantially covered by another instruction which was given.

II. In affirming the trial courts refusal to charge the jury on conspiracy with a government agent because it was substantially covered by other jury instuctions, seriously departs from the accepted and usual course of judicial proceedings and calls for an excercise of this court's power of supervision.

The government in this case relies on the entrapment instruction given by the judge as "substantially covering" the charge that a person cannot conspire with a government agent, and that James became a government agent when he made the deal with

foundation in the evidence. United States v. Young, 464 F.2d 160, 163 (5th Cir. 1972), citing Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951).

Following the above requirements, the charge requested in this case is clearly correct. The disagreement arises over the question whether the requested instruction was substantially covered by another instruction which was given.

II. <u>In addition the trial court's refusal to charge the jury on conspiracy with a government agent because it was substantially covered by other jury instructions, seriously departs from the accepted and usual course of judicial proceedings and calls for an exercise of this court's power of supervision.</u>

The government in this case relies on the entrapment instruction given by the judge as "substantially covering" the charge that a person cannot conspire with a government agent, and that James became a government agent when he made the deal with

the police [App. p. (20-23)]. The entrapment instruction does not mention conspiracy or any of the necessary elements in a proper instruction on the effect of a government informer as a co-conspirator. A simple reading of the entrapment instruction is convincing proof that the charge did not adequately inform the jury of the law they needed to know in order to fairly decide the case. That means Petitioner was deprived of the ability to present an adequate defense to the conspiracy count, the only count on which he was convicted.

The refusal of the 11th Circuit to overturn the denial of an important and proper jury instruction without an opinion explaining their inaction seriously departs from the accepted and usual course of judicial proceedings and calls for an excercise of this court's power of supervision.

III. The decision of the Eleventh Circuit is in direct conflict with several of its own opinions regarding critical elements of jury instructions, resulting in the petitioner's violation of due process guaranteed by the Constitution.

Although an ambiguous jury verdict is not reversible error, the unresolved question as to the amount of cocaine for which Badger was convicted in this case denies him due process of law. The government was not clear as to which amount it accused Badger of conspiring with intent to possess -- one-half ounce or four kilograms. While the original indictment charged Badger with conspiring to possess four kilograms of cocaine, the superseding indictment omitted any reference to amount. When the judge refused to charge the jury that, if they convicted Badger, they should state as to which amount they

were convicting him of conspiring to possess, the verdict became so ambiguous that Badger was denied due process in receiving a sentence for conspiracy to possess four kilograms of cocaine.

The defense requested that the court sentence Badger for conspiring to distribute a half-ounce of cocaine with an offense level of 12, Category I, which has a sentencing range of ten to sixteen months.[1] Instead, the court sentenced Badger for conspiracy to possess with the intent to distribute four kilograms of cocaine, which placed Badger at an offense level of 32, Category I, with a sentencing range of 121 to 151 months.[2]

Because of the ambiguity as to the

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1 Federal Sentencing Guidelines Manual, West Publishing Co. (1988), pages 63, 216.

2 Federal Sentencing Guidelines Manual, West Publishing Co. (1988), pages 62, 216.

amount of cocaine which Badger was convicted of conspiring to possess, Badger was impermissibly denied his constitutional rights under the due process clause of the Constitution to have a jury apply the standard of proof beyond a reasonable doubt to an essential element of the crime with which he was charged.

The 11th Circuit Court of Appeals held in Alvarez 735 F.2d 461 (11th Cir. 1965) that quantity of substance is a critical element of the offense under 21 U.S.C. Sec. 841. The general verdict as to conspiracy made it impossible to determine which object the jury found. The government tries to distinguish Alvarez from the present case by contending that proof was only argued and offered for four kilograms of cocaine. The petitioner points out that Alvarez should not be distinguished from his case because there was a substantial amount of evidence presented at trial about a

critical element of the offense requiring the jury to determine the amount of cocaine that petitioner conspired to possess.

Badger's original indictment accused him of possession with intent to distribute four kilograms of cocaine (R1-1). The superseding indictment added the conspiracy count and omitted any references as to the amount of the contraband in the indictment (R1-181). During the trial, the defense became concerned that the jury might believe that Badger was not guilty of conspiracy to possess four kilos of cocaine with the intent to distribute and possession of four kilos with intent to distribute, and at the same time possibly convict him on the conspiracy count, based on his admission that he had obtained a half ounce of cocaine from James two and a half weeks previously. (See Argument #1 above.) The defense made a specific request to charge, in writing, at the close

of the evidence, requesting that the Court instruct the jury that, if they find the defendant guilty on either count, they should make a determination as to the amount of cocaine with respect to that count (R1-27-49) [App. p. (37-38)]. The Court refused to give the requested instruction, and the defense made a timely objection (R5-70). This ultimately resulted in the trial Court making a determination as to the amount of cocaine involved in the conspiracy at Badger's sentencing.

In McMillan v. Pennsylvania, 106 Sup.Ct. 2411 (1986), the Supreme Court, in a five-to-four decision, ruled that a state could properly treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense that must be proved beyond a reasonable doubt. The Court further held that:

> "while there are constitutional limits beyond which the states may not go in this regard, the applicability of the reasonable doubt standard has always been dependent on how a state defines the offense that it has charged in any given case. McMillan v. Pennsylvania, 106 Sup.Ct. 2411, 2416 (1986)."

However, the McMillan Court distinguished those cases where the Act provided for a wide "differential in sentencing". Indeed, the Court took note of Mullany v. Wilbur, 421 U.S. 684, 95 Sup. Ct. 1881 (1975), in which the wide differential in sentencing ranging from a nominal fine to a mandatory life sentence was a key factor in the Court holding that a Maine statutory scheme respecting murder and manslaughter violated due process requirements in that the prosecution must prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue is in a homicide case, rather than requiring a defendant to establish by a preponderence of the

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evidence that he acted in the heat of passion. Mullany v. Wilbur, 95 Sup.Ct. 1881 (1975). The Court in Mullany stated:

> Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned ...These interests are implicated to a greater degree in this case than they were in Winship itself (In Re: Winship, 397 U.S. 358, 90 Sup. Ct. 1068 (1970).) The petitioner there faced an 18-month sentence with a maximum possible extension of an additional four and a half years (Winship at 397 U.S. 360, 90 Sup.Ct. 1070 (1970)), whereas respondent here faces a differential in sentencing ranging from a nominal fine to a mandatory life sentence. Both the stigma to the defendant and the community's confidence in the administration of the criminal law are also of greater consequence in this case.

The Guidelines promulgated by the

Sentencing Commission have as wide a range applied in a more rigid fashion. In a narcotics case, a defendant can be sentenced to anywhere from a probated sentence to a mandatory life sentence. For possession of cocaine with an admission of guilt, he could be sentenced anywhere from two months to life in the penitentiary.[3] In a conspiracy case, where no overt act is required, and where no amount of contraband is referred to in the indictment, the criminally accused is effectively denied his rights under the Due Process Clause of the Constitution.

The Sentencing Commission initially sought to develop a "real offense system" as opposed to a charge offense system. The Commission admitted that its initial efforts in this direction, carried out in the spring and early summer of 1986, proved

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3 Federal Sentencing Guidelines Manual, West Publishing Company (1988), pages 62, 63, 216.

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[3] Federal Sentencing Guidelines Manual, West Publishing Company (1993), pages 42, 43, 316

unproductive, mostly for practical reasons. In its policy statements, the Commission admits that its sentencing structure could punish a defendant for charges not contained in the indictment.[4]

18 U.S.C. Section 3553B allows the sentencing Court to depart from the Guidelines when it finds an "aggravating or mitigating circumstance" that was not adequately taken into consideration by the Sentencing Commission.

The defendant's sentence can be greatly enhanced on the basis of charges that are not even included in the indictment. In effect, a person accused of conspiracy to possess one ounce of cocaine could be sentenced to a multiple kilos without having an opportunity to confront the charges.

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4 Federal Sentencing Guidelines Manual, West Publishing Company (1988), pages 5, 6.

There could not be a better example of a defendant losing his right to confront the charges against him in a trial by jury than the case of Royce Boddie Badger. When the trial Court refused to grant Badger's request to have the jury determine the amount of cocaine involved if he were found guilty of any of the charges (R1-27-49) (R5-70, 71), the trial Court effectively reserved the decision whether Badger conspired with Greg James to possess with intent to distribute four kilograms of cocaine. Later, the Court not only ruled that it was a four-kilogram case and not a one-half ounce conspiracy, but by its ruling it also determined that the jury could not have believed that it was a one-half ounce conspiracy case.

This was despite the fact that the jury determined that on March 14, 1988, Royce Boddie Badger was not guilty of possession of cocaine with intent to

distribute and not guilty of simple possession of cocaine. This was further complicated by the fact that the trial Court had charged the jury that "the proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged in the indictment" (R5-54). The prosecution objected to the closing argument by the defense that in order to find Greg James guilty on a conspiracy charge, "you have to believe beyond a reasonable doubt that Royce Boddie Badger had an agreement with Greg James to distribute four kilos of cocaine, not a payment on an old drug debt" (R5-39). The Court sustained the objection, thus allowing the jury to take into account the possibility of conspiring with Greg James to distribute a half ounce

of cocaine (R5-39). The Court further ruled that the government did not have to prove any amount of cocaine (R5-40).

The combination of the facts in Badger's case, the Court's ruling as to the time alleged in the indictment, the Court's refusal that to let the jury determine the amount of contraband in question, the Court's refusal to allow the defense to argue that the conspiracy count should only concern the distribution of four kilos of cocaine, and the application of the Sentencing Guidelines, effectively denied Badger's right under the due process clause to the standard of proof beyond a reasonable doubt as to the distribution of four kilos. In effect, he was open to conviction for buying a half ounce of cocaine while being sentenced for distribution of four kilos.

In U.S. v. Quicksey, 525 F.2d 337 (4th Cir. 1975), the Defendants were

charged with conspiracy to violate the Travel Act and with conspiracy to violate the drug laws. The trial Court refused the Defendants' motion to require the government to elect which statute it was relying on. The Appellate Court held that because of the ambiguity, judgment would be withheld so as to give the government time to consent to resentencing under the lesser penalty for conspiracy to violate the Travel Act. If the consent was given, the convictions would be affirmed, but if consent was not given, then the convictions would be vacated and remanded for new trial. U.S. v. Quicksey, 525 F.2d 337 (4th Cir. 1975).

In U.S. v. Orozco-Prada, 732 F.2d 1076 (2nd Cir. 1984), the Court held that, where Count I of the indictment charged a conspiracy punishable under both Sections 841(b)(1)(A) and Section 841 (b)(1)(B), with one section covering cocaine and authorizing a sentence of up to fifteen

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In U.S. v. Orozco-Prada, 732 F.2d 1076 (2nd Cir. 1984), the Court held that, where Count I of the indictment charged a conspiracy punishable under both Sections 841(b)(1)(A) and Section 841 (b)(1)(B), with one section covering cocaine and authorizing a sentence of up to fifteen

years, and the latter section covering marijuana which allows a sentence of up to five years, "in the absence of a special verdict there was no way for the Trial Court to know whether the jury intended to convict Eduardo Orozco for a cocaine related conspiracy, for a marijuana related conspiracy, or for a conspiracy involving both drugs." The Court held that where there is a conspiracy which charges a violation of a single conspiracy statute, but where the conspiracy has possibly two objects, the Defendant must be sentenced as if he violated the conspiracy with the least punishment. U.S. v. Orozco-Prada, 732 F.2d 1076, 1083, 1084 (1984). See also Brown v. U.S., 299 F.2d 438 (DC Cir.), cert. denied, 370 U.S. 946, 82 Sup. Ct. 1593 (1962); U.S. v. Noah, 475 F.2d 688, 693 (9th Cir. 1973); U.S. v. Amato, 367 F. Supp. 547, 549 (S.D. N.Y. 1973).

years, and the latter section covering marijuana which allows a sentence of up to five years, "in the absence of a special verdict there was no way for the Trial Court to know whether the jury intended to convict Eduardo Orozco for a cocaine related conspiracy, for a marijuana related conspiracy, or for a conspiracy involving both drugs." The Court held that where there is a conspiracy which charges a violation of a single conspiracy statute, but where the conspiracy has possibly two objects, the Defendant must be sentenced as if he violated the conspiracy with the least punishment. U.S. v. Orozco-Prada, 732 F.2d 1076, 1083, 1084 (1984). See also Brown v. U.S., 299 F.2d 438 (DC Cir.), cert. denied, 370 U.S. 946, 82 Sup. Ct. 1593 (1962); U.S. v. Mash, 475 F.2d 585, 593 (5th Cir. 1973); U.S. v. Amato, 367 F. Supp. 547, 549 (S.D. N.Y. 1973).

ARGUMENT

Application of the Federal Sentencing Guidelines to a case in which a serious factual dispute as to the amount of contraband in question surely affects the defendant's right to a trial by jury. Badger's trial is unique in that he admitted he was present at the scene of the arrest on the date in question in order to repay a debt involving one-half ounce of cocaine. The government contended, through its informant/agent, that Badger was there to purchase four kilograms of cocaine. Badger had requested that the jury determine the amount of cocaine involved in the transaction, realizing that the jury might find him guilty to conspiracy on his admission that he had purchased 1/2 ounce of cocaine from the informant/agent.

The jury found Badger not guilty of possessing cocaine with the intent to distribute on or about the date in question, despite the government's claim

ARGUMENT

that Badger picked up the suitcase containing the contraband. The trial court's refusal to allow the jury to state how much cocaine was involved in Badger's conspiracy, and the court's refusal to charge the jury that Badger could not conspire with an agent for the government, in effect deprived Badger of trial by jury.

The trial court's refusal to submit Defendant's interrogatories to the jury, the refusal to charge Defendant's requests pertaining to the conspiracy with a government agent, and the Appellate Court's affirmation of this ruling by the 11th Circuit Court of Appeals, constitute a departure from the accepted and usual course of judicial proceedings, such departure presenting an important and substantial question of federal law which should be decided by this Honorable Court.

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The trial court's refusal to submit Defendant's interrogatories to the jury, the refusal to charge Defendant's requests pertaining to the conspiracy with a government agent, and the Appellate Court's affirmation of this ruling by the Fifth Circuit Court of Appeals, constitute a departure from the accepted and usual course of judicial proceedings, such departure presenting an important and substantial question of federal law which should be decided by this Honorable Court.

CONCLUSION

For the reasons stated above, Petitioner urges this Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted

W. MICHAEL MALOOF,
Attorney for
Petioner
ROYCE BODDIE BADGER

215 N. McDonough St.
Decatur, Georgia 30030
(404) 373-8000

APPENDIX, PART 1

Decisions of the 11th Circuit Court

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---------- "DO NOT

No. 88-8666 PUBLISH"

D.C. Docket No. 88-177

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROYCE BODDIE BADGER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(April 10, 1989)

Before KRAVITCH and CLARK, Circuit Judges and HENDERSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

Judgment Entered: April 10, 1989
For the Court: Miguel J. Cortez, Clerk

By: (signature of David Maland)
Deputy Clerk

ISSUED AS MANDATE: JUN 29, 1989

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-8666

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

versus

ROYCE BODDIE BADGER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion April 10, 11 Cir., 1989, ____ F.2d)__).

(June 20, 1989)

Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.
PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-8566

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

versus

ROYCE HODGIE DANSER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.
PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having

voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

(Signature of Thomas A. Clark)
United States Circuit Judge

"ORD-42"

APPENDIX, PART 2

There are no other opinions under Supreme Court Rule 21(k)(ii).

APPENDIX, PART 3

Judgment Including Sentence Under the Sentencing Reform Act

UNITED STATES DISTRICT COURT

Northern District of Georgia

UNITED STATES OF AMERICA

v.

ROYCE BODDIE BADGER

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case No. CR88-177A

Mike Maloof
Defendant's Attorney

THE DEFENDANT:

( ) pleaded guilty to count(s)_____.
(X) was found guilty on count(s) (One) after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21. USC 846	Conspiracy to Possess Cocaine with Intent to Distribute.	One

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

(X) The defendant has been found not guilty on count(s) Two.
( ) Count(s) _____ (is)(are) dismissed on the motion of the United States.
( ) The mandatory special assessment is

included in the portion of this Judgment that imposes a fine.
(X) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:	Date of Imsition of Sentence:
265-43-3373	August 17, 1988

Defendant's mailing address:

880 Fox Chase Lane
Riverdale, GA

(Signature of Robert L. Vining, Jr.)
Signature of Judicial Officer

Defendant's residence address:

ROBERT L. VINING, JR.
US District Judge

Date: August 17, 1988

Defendant: ROYCE BODDIE BADGER

Judgment, Page 2 of 4

Case Number: CR88-177A

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY ONE (121) MONTHS.

( ) The Court makes the following recommendations to the Bureau of Prisons:

(X) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district,
( ) at ___am/pm on _____.
( ) as notified by the Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
( ) before 2 pm on _____.
( ) as notified by the United States Marshal.
( ) as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____, with a certified copy of this Judgment.

_____
United States Marshal

Defendant: ROYCE BODDIE BADGER
Case Number: CR88-177A

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

( ) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant:
Case Number:

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

APPENDIX, PART 4

Charges of Trial Court

Requested Charges by Appellant

Court's Ruling That the Amount of Contraband Is Not Relevant

Presentence Report and Addendum

REQUEST TO CHARGE NO. 13

For an agreement to be punishable, each of the parties must be subject to prosecution. In other words, if you find from the evidence that the defendant entered into an agreement with a government agent to violate the law, but did not enter into an agreement with someone other than an agent of the government, then the conspiracy statute is not violated and you must return a verdict of not guilty of the offense of conspiracy charged in the indictment.

Gerbardi v. U.S., 287 U.S. 112.

Morrison v. California, 291 U.S. 82, 93.

REQUEST TO CHARGE NO. 22

Ladies and Gentlemen of the Jury, I charge you that Greg James became a government agent in connection with this case after he agreed to cooperate with the government.

COMING UP THERE AND PAYING OFF ON THIS DEBT?" NOTHING. NOT A SINGLE AGENT HAS TESTIFIED TO THAT, NOT ONE.

THAT'S WHAT REASONABLE DOUBT IS ALL ABOUT, LADIES AND GENTLEMEN.

THERE ARE TWO CHARGES IN THIS CASE. ONE IS THE CONSPIRACY CHARGE. THAT STARTS, ACCORDING TO THE GOVERNMENT, BACK ON THE 9TH, FIVE DAYS BEFORE THIS HAPPENED. YOU HAVE TO HAVE EVIDENCE IN YOUR HANDS AND YOU HAVE TO BELIEVE BEYOND A REASONABLE DOUBT THAT ROYCE BODDIE BADGER HAD AN AGREEMENT WITH GREG JAMES TO DISTRIBUTE FOUR KILOS OF COCAINE, NOT THE PAYMENT ON AN OLD DRUG DEBT.

MS. HOWARD: OBJECTION, YOUR HONOR, THAT'S NOT WHAT HE IS CHARGED WITH, THAT'S NOT A CORRECT STATEMENT OF THE LAW.

THE COURT: THAT'S RIGHT. THAT STATEMENT IS NOT CORRECT.

MR. MALOOF: LADIES AND GENTLEMEN, YOU HAVE GOT TO BELIEVE THERE IS AN AGREEMENT TO VIOLATE THE DRUG TRAFFICKING LAWS BETWEEN GREG JAMES AND ROYCE BODDIE

BADGER. THIS CASE IS NOT ABOUT THAT HALF OUNCE PREVIOUS DEAL BETWEEN THOSE TWO. IT IS ABOUT THOSE FOUR KILOS OF COCAINE. IF YOU DO NOT HAVE EVIDENCE OF THAT AGREEMENT, YOU MUST FIND HIM NOT GUILTY. IF YOU HAVE A REASONABLE DOUBT OF THAT AGREEMENT, YOU MUST FIND HIM NOT GUILTY, AND THE SAME IS TRUE NOW OF THE OTHER CHARGE, POSSESSION WITH INTENT TO DISTRIBUTE. . IN ORDER TO FIND ROYCE (Begin Record, p. 40) BODDIE BADGER GUILTY OF THAT CHARGE, YOU HAVE GOT TO BELIEVE BEYOND A REASONABLE DOUBT THAT HE THOUGHT OR BELIEVED THERE WAS FOUR KILOS OF COCAINE IN THAT BAG, THAT HE KNEW --

MS. HOWARD: OBJECTION, YOUR HONOR. AGAIN THAT'S NOT A CORRECT STATEMENT OF THE LAW OR THE CHARGE.

MR. MALOOF: I THINK IT IS, YOUR HONOR.

MS. HOWARD: THERE IS NO ALLEGATION OF THE AMOUNT IN THE INDICEMENT AND THE GOVERNMENT IS NOT REQUIRED TO PROVE THAT.

THE COURT: THAT'S RIGHT, YOU DON'T HAVE TO PROVE AMOUNT.

ALL HE HAS TO PROVE IS THE INTENT.

MR. MALOOF: I'M SORRY. I STAND CORRECTED, YOUR HONOR.

THE COURT: POSSESSION WITH INTENT TO SELL.

MR. MALOOF: YOU HAVE GOT TO BELIEVE THAT ROYCE BODDIE BADGER HAD THE INTENT TO DISTRIBUTE THE COCAINE. YOU HAVE TO BELIEVE THAT HE HAD THAT IN HIS MIND BEYOND A REASONABLE DOUBT.

LADIES AND GENTLEMEN, THE EVIDENCE INI THIS CASE POINTS IN ALL THE OTHER DIRECTIONS. ROYCE BODDIE BADGER COULD HAVE TOLD YOU A LOT OF LIES. HE ADMITTED TO YOU ABOUT THE GUN. HE DIDN'T WANT TO HAVE TO ADMIT TO THAT, BUT IT WAS TRUE. . HE TOLD YOU ABOUT THE GUN BECAUSE IT IS WHAT HAPPENED. HE COULD HAVE SAID HE WAS THERE TO SELL A CAR OR PICK UP (end of Record page)

ACT. TO ESTABLISH SPECIFIC INTENT THE GOVERNMENT MUST PROVE THE DEFENDANT KNOWINGLY, WILFULLY AND INTENTIONALLY DID AN ACT WHICH THE LAW FORBIDS, PURPOSELY INTENDING TO VIOLATE THE LAW, AND SUCH INTENT MAY BE DETERMINED FROM ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING THIS CASE.

TO CONSTITUTE THE CRIMES CHARGED IN THE INDICTMENT, THERE MUST BE A JOINT OPERATION OF TWO ESSENTIAL ELEMENTS: AN ACT FORBIDDEN BY LAW AND AN INTENT TO DO THE ACT. BEFORE A DEFENDANT CAN BE FOUND GUILTY OF THESE CRIMES, THE PROSECUTION MUST ESTABLISH BEYOND A REASONABLE DOUBT THAT UNDER THE STATUTES DESCRIBED IN THESE INSTRUCTIONS THE DEFENDANT WAS FORBIDDEN TO DO THE ACT CHARGED IN THE INDICTMENT AND HE INTENTIONALLY COMMITTED THE ACT.

THE LAW NEVER IMPOSES UPON A DEFENDANT IN A CRIMINAL CASE THE BURDEN OR DUTY OF CALLING ANY WITNESSES OR PRODUCING ANY EVIDENCE. THE BURDEN OF PROOF IN

CHARGING IN THESE CASES RESTS SOLELY UPON THE GOVERNMENT.

NOW, ALTHOUGH THE ELEMENT OF INTENT TO AGREE TO DO A WRONGFUL ACT MUST USUALLY BE PROVED BY CIRCUMSTANTIAL EVIDENCE. NEVERTHELESS, SUCH INTENT MUST BE ESTABLISHED TO SUSTAIN A CONVICTION OF EITHER COUNT IN THE INDICTMENT, THAT IS, CONSPIRACY OR POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE. AND A CONVICTION BASED UPON ASSOCIATION ALONE WOULD NOT BE PERMITTED TO STAND IN THIS CASE.

(Begin Record, p. 56)

—INTENT OF ONE TO COMMIT AN OFFENSE USUALLY MUST BE DETERMINED BY WHAT WENT ON AT THE PARTICULAR TIME AND PLACE IN QUESTION. YOU CAN'T LOOK INSIDE OF A PERSON'S HEAD AND SAY THAT THEY INTENDED TO DO OR DID NOT INTEND TO DO SOME SPECIFIC ACT. THAT IS NOT POSSIBLE. SO WHAT YOU MUST DO IN DECIDING WHETHER OR NOT THIS DEFENDANT HAD AN INTENT TO COMMIT EITHER OF THE OFFENSES CHARGED IN THE BILL OF

INDICTMENT, IS TO TAKE INTO ACCOUNT ALL OF THE FACTS AND CIRCUMSTANCES CONNECTED WITH THE OFFENSES CHARGED IN THIS BILL OF INDICTMENT AND THEN SAY FOR YOURSELF WHETHER OR NOT HE HAD AN INTENT AND THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT TO COMMIT EITHER ONE OR BOTH OF THE OFFENSES CHARGED IN THE BILL OF INDICTMENT.

NOW, IN THIS CASE THE DEFENDANT ALLEGES THAT THERE WAS ENTRAPMENT, THAT IS, THAT THE GOVERNMENT LAID A TRAP FOR HIM TO GET HIM TO COMMIT THESE OFFENSES. ENTRAPMENT OCCURS WHEN CRIMINAL CONDUCT IS THE PRODUCT OF THE CREATIVE ACTIVITY OF THE GOVERNMENT; SUCH A THEORY OF DEFENSE RAISED ON THE BELIEF THAT NO ONE SHOULD BE CONVICTED OF A CRIME IF HE WAS EITHER INNOCENTLY SEDUCED BY THE GOVERNMENT AGENTS OR ONE OF THOSE WHOSE RESISTANCE WAS OVERCOME. IF YOU FIND THE GOVERNMENT THROUGH AN INFORMER CREATED THE ACTIVITY CONSTITUTING THE OFFENSE CHARGED AND THE DEFENDANT PARTICIPATED IN ANY CAPACITY IN THE OFFENSE, THEN THE DEFENDANT COULD BE

SAID TO BE ENTRAPPED BY THE GOVERNMENT, (Begin Record, p. 57) AND IF YOU FIND ENTRAPMENT, IT WOULD THEN BE YOUR DUTY TO ACQUIT THE DEFENDANT.

NOW, THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT AS TO EACH ELEMENT OF THE OFFENSE IS ALSO ON THE GOVERNMENT. AN INTENT IS AN ESSENTIAL ELEMENT OF THE OFFENSE. THE BURDEN THEN WOULD BE UPON THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS NOT A VICTIM OF ENTRAPMENT OR, IN OTHER WORDS, THE GOVERNMENT HAS THE BURDEN OF PROVING NONENTRAPMENT BEYOND A REASONABLE DOUBT.

WHERE A PERSON HAS NOT FORMED THE INTENT TO VIOLATE THE LAW BUT IS INDUCED OR PERSUADED BY LAW ENFORCEMENT OFFICERS OR THEIR AGENTS TO COMMIT A CRIME, THEN HE COULD BE SAID TO BE THE VICTIM OF ENTRAPMENT. THE LAW AS A MATTER OF POLICY WOULD FORBID HIS CONVICTION IN SUCH A CASE. IF THE EVIDENCE IN THIS CASE SHOULD LEAVE YOU WITH A REASONABLE DOUBT WHETHER THE DEFENDANT HAD PREVIOUS INTENT OR

PURPOSE TO COMMIT AN OFFENSE OF THE CHARACTER CHARGED WITHOUT INDUCEMENT OR PERSUASION OF SOME OFFICER OR AGENT OF THE GOVERNMENT, THEN IT WOULD BE YOUR DUTY TO FIND HIM NOT GUILTY.

NOW, ENTRAPMENT OCCURS WHEN THE CRIMINAL DESIGN ORIGINATES WITH THE GOVERNMENT AND THEY IMPLANT IN THE MIND OF AN INNOCENT PERSON THE DISPOSITION TO COMMIT THE ALLEGED OFFENSE AND INDUCE ITS COMMISSION IN ORDER THAT THEY MAY PROSECUTE. THE INQUIRY IS ON THE DEFENDANT'S PREDISPOSITION, THAT IS HIS INTENT OR WILLINGNESS BEFORE CONTACT WITH (Begin Record, p. 58) GOVERNMENT AGENTS AND INDUCEMENT TO COMMIT THE CRIMES CHARGED. WHAT IT MEANS IS DID THE GOVERNMENT PRODUCE THIS OFFENSE OR DID THE DEFENDANT HAVE A PREDISPOSITION BEFORE ANY CONTACT WITH THE GOVERNMENT TO COMMIT THIS OFFENSE? IF HE DID NOT HAVE A PREDISPOSITION TO COMMIT THE OFFENSE, THEN THAT WOULD BE ENTRAPMENT. IF HE HAD A PREDISPOSITION TO COMMIT THESE OFFENSES, THEN HE CAN'T BE ENTRAPPED. SO

THAT IS WHAT YOU MUST DECIDE AS FAR AS THAT PORTION OF THE CASE IS CONCERNED.

NOW, IN THE BILL OF INDICTMENT -- AND I'M GOING TO READ YOU VARIOUS PORTIONS OF THE INDICTMENT, BUT I WANT TO CAUTION YOU THAT SIMPLY BECAUSE I'M READING IT TO YOU DOES NOT INDICATE THAT I HAVE AN OPINION ABOUT WHETHER THERE IS GUILT OR INNOCENCE IN THIS CASE. I DO NOT. I'M SIMPLY READING THE -- SOME PORTIONS OFO THE INDICTMENT TO YOU SO THAT I CAN CONNECT IT UP WITH CERTAIN DEFINITIONS THAT I AM GOING TO READ TO YOU AND HOPEFULLY MAKE IT MORE UNDERSTANDABLE. AND YOU WILL HAVE THIS INDICTMENT OUT WITH YOU WHEN YOU RETIRE TO CONSIDER THE CASE AND YOU SHOULD READ IT TO SEE WHAT IT CONTAINS, ALWAYS KEEPING IN MIND THAT THE DEFENDANT HAS ENTERED A PLEA OF NOT GUILTY TO THE CHARGES IN THE BILL OF INDICTMENT.

NOW IN COUNT ONE IT IS CHARGED IN THIS CASE THAT THIS DEFENDANT AND ONE GREGORY LEROY JAMES DID COMBINE, CONSPIRE, CONFEDERATE AND AGREE AND HAVE AN

UNDERSTANDING (Begin Record, p. 59) WITH ONE ANOTHER THAT THEY WOULD COMMIT A(N) OFFENSE AGAINST THE UNITED STATES. THAT IS AN OFFENSE CONTAINED IN SECTION 841(A)(1) OF TITLE 21 OF THE UNITED STATES CODE. THAT IS THAT THEY WOULD UNLAWFULLY, KNOWINGLY AND INTENTIONALLY POSSESS WITH INTENT TO DISTRIBUTE COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE, AND THAT THIS IS A VIOLATION OF THE LAW.

I CHARGE YOU THAT A CONSPIRACY IS A COMBINATION OR AGREEMENT OF TWO OR MORE PEOPLE TO JOIN TOGETHER TO ATTEMPT TO ACCOMPLISH SOME UNLAWFUL PURPOSE. IT IS A KIND OF PARTNERSHIP IN CRIMINAL PURPOSES IN WHICH EACH MEMBER BECOMES THE AGENT OF EVERY OTHER MEMBER. THE GIST OR ESSENCE OF THE OFFENSE OF CONSPIRACY IS A COMBINATION OR MUTUAL AGREEMENT BY TWO OR MORE PERSONS TO DISOBEY OR DISREGARD THE LAW. THE EVIDENCE IN THE CASE NEED NOT SHOW THAT THE ALLEGED MEMBERS OF THE CONSPIRACY ENTERED INTO ANY EXPRESS OR FORMAL AGREEMENT OR THAT THEY DIRECTLY STATED BETWEEN

THEMSELVES THE DETAIL OF THE SCHEME AND ITS OBJECT OR PURPOSES OR THE PRECISE MEANS BY WHICH THE OBJECT OR PURPOSE WAS TO BE ACCOMPLISHED. LIKEWISE, THE EVIDENCE IN THE CASE NEED NOT ESTABLISH THAT ALL OF THE MEANS OR METHODS SET OUT IN THE INDICTMENT WERE IN FACT AGREED UPON TO CARRY OUT THE ALLEGED CONSPIRACY OR THAT ALL OF THE MEANS OR METHODS WHICH WERE AGREED UPON WERE ACTUALLY NEEDED OR PUT INTO OPERATION.

WHAT THE EVIDENCE MUST SHOW BEYOND A REASONABLE (Begin Record, p. 60) DOUBT IS THIS: THAT TWO OR MORE PERSONS IN SOME WAY OR MANNER POSITIVELY OR TACITLY CAME TO A MUTUAL UNDERSTANDING TO TRY TO ACCOMPLISH A COMMON AND UNLAWFUL PLAN AS CHARGED IN THE INDICTMENT. AND, TWO, THAT THE DEFENDANT WILLFULLY BECAME A MEMBER OF THAT CONSPIRACY. ONE MAY BECOME A MEMBER OF A CONSPIRACY WITHOUT FULL KNOWLEDGE OF THE DETAILS OF AN UNLAWFUL SCHEME OR THE NAMES AND IDENTITIES OF EVERYONE INVOLVED IN THE CONSPIRACY.

SO IF A DEFENDANT WITH AN UNDERSTANDING OF THE UNLAWFUL CHARACTER OF A PLAN KNOWINGLY AND WILLING JOINS IN AN UNLAWFUL SCHEME ON ONE OCCASION, THAT IS SUFFICIENT TO CONVICT HIM FOR CONSPIRACY EVEN THOUGH HE HAD NOT PARTICIPATED AT THE EARLIER STAGES IN THE SCHEME AND EVEN THOUGH HE MIGHT HAVE PLAYED ONLY A MINOR PART IN THE CONSPIRACY. MERE PRESENCE AT THE SCENE OF AN ALLEGED TRANSACTION OR EVENTS OR MERELY SIMILARITY OF CONDUCT AMONG VARIOUS PERSONS AND THE FACT THEY MAY HAVE ASSOCIATED WITH EACH OTHER AND MAY HAVE ASSEMBLED TOGETHER AND DISCUSSED COMMON AIMS AND INTEREST DOES NOT NECESSARILY ESTABLISH PROOF OF THE EXISTENCE OF A CONSPIRACY. ALSO A PERSON WHO HAS NO KNOWLEDGE OF A CONSPIRACY BUT WHO HAPPENS TO ACT IN A WAY WHICH ADVANCES SOME OBJECT OR PURPOSE OF A CONSPIRACY DOES NOT THEREBY BECOME A CONSPIRATOR. IN YOUR CONSIDERATION OF THE CONSPIRACY OFFENSE AS ALLEGED IN THE INDICTMENT, YOU SHOULD FIRST DETERMINE FROM ALL OF THE TESTIMONY AND

EVIDENCE (Begin Record, p. 61) IN THE CASE WHETHER OR NOT THE CONSPIRACY EXISTED AS CHARGED. IF YOU CONCLUDE THAT A CONSPIRACY DID EXIST AS ALLEGED, YOU SHOULD NEXT DETERMINE WHETHER OR NOT THE DEFENDANT WILLFULLY BECAME A MEMBER OF SUCH A CONSPIRACY. IN DETERMINING WHETHER A DEFENDANT WAS A MEMBER OF A CONSPIRACY, YOU SHOULD CONSIDER ONLY THE EVIDENCE PERTAINING TO HIS ACTS AND STATEMENTS. HE IS NOT RESPONSIBLE FOR THE ACTS OR DECLARATIONS OF OTHER ALLEGED PARTICIPANTS UNTIL IT IS ESTABLISHED BEYOND A REASONABLE DOUBT, FIRST, THAT A CONSPIRACY EXISTED AND, SECOND, FROM THE EVIDENCE OF HIS OWN AGENTS AND STATEMENTS THAT THE DEFENDANT WAS ONE OF THE MEMBERS OF THE CONSPIRACY.

NOW, IF IT DOES APPEAR BEYOND A REASONABLE DOUBT FROM THE EVIDENCE IN THE CASE THAT A CONSPIRACY DID EXIST AND THE DEFENDANT UNDER CONSIDERATION WAS ONE OF ITS MEMBERS, THEN THE STATEMENTS AND ACTS KNOWINGLY MADE AND DONE DURING SUCH CONSPIRACY AND IN FURTHERANCE OF ITS

OBJECTS BY ANY OTHER PROVEN MEMBER OF THE CONSPIRACY MAY BE CONSIDERED BY YOU AS EVIDENCE AGAINST THE DEFENDANT UNDER CONSIDERATION EVEN THOUGH HE MIGHT NOT HAVE BEEN PRESENT TO HEAR THE STATEMENTS MADE OR SEE THE ACT DONE. THAT IS TRUE BECAUSE, AS STATED EARLIER, A CONSPIRACY IS A KIND OF PARTNERSHIP SO THAT UNDER THE LAW EACH MEMBER IS A(N) AGENT OR PARTNER OF EVERY OTHER MEMBER AND IS RESPONSBILE FOR THE ACTS OF EVERY OTHER MEMBER MADE IN PURSUANCE OF THE UNLAWFUL SCHEME.

NOW, IN COUNT TWO OF THE INDICTMENT IT IS CHARGED (End of Record page)

ANYONE TO POSSESS A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE IT. AND I CHARGE YOU THAT COCAINE IS A CONTROLLED SUBSTANCE WITHIN THE MEANING OF THIS LAW.

NOW, A DEFENDANT MAY BE FOUND GUILTY OF THIS OFFENSE ONLY IF THE FOLLOWING FACTS ARE PROVED BEYOND A REASONABLE DOUBT: THAT THE DEFENDANT KNOWINGLY AND WILLFULLY POSSESSED COCAINE AS CHARGED AND, SECOND, THAT HE POSSESSED THE SUBSTANCE, COCAINE, WITH THE INTENT TO DISTRIBUTE. TO POSSESS WITH INTENT TO DISTRIBUTE SIMPLY MEANS TO POSSESS WITH INTENT TO DELIVER OR TRANSFER POSSESSION OF A CONTROLLED SUBSTANCE TO ANOTHER PERSON WITH OR WITHOUT ANY FINANCIAL INTEREST IN THE TRANSACTION.

THE TERM DELIVER MEANS THE ACTUAL CONSTRUCTIVE OR ATTEMPTED TRANSFER OF A CONTROLLED SUBSTANCE. THERE IS NO NEED TO SHOW A SALE IN ORDER TO PROVE A CHARGE OF ILLEGAL DISTRIBUTION. AND I CHARGE YOU THAT COCAINE IS A CONTROLLED SUBSTANCE UNDER THE LAWS OF THE UNITED STATES.

THE WORD POSSESSION AS USED IN THESE INSTRUCTIONS MEANS EITHER ACTUAL POSSESSION OR CONSTRUCTIVE POSSESSION. A PERSON WHO HAS DIRECT PHYSICAL CONTROL OVER A THING AT A GIVEN TIME HAS ACTUAL POSSESSION OF IT. A PERSON WHO ALTHOUGH NOT IN ACTUAL POSSESSION KNOWINGLY HAS BOTH THE POWER AND INTENTION TO EXERCISE CONTROL OVER A THING, EITHER DIRECTLY OR THROUGH ANOTHER PERSON, HAS CONSTRUCTIVE POSSESSION OF IT. POSSESSIONO MAY BE SOLE OR JOINT. IF ONE (Begin Record, p. 64) PERSON ALONE HAS ACTUAL OR CONSTRUCTIVE POSSESSION OF A THING, POSSESSION IS SOLE. IF TWO OR MORE PERSONS SHARE ACTUAL OR CONSTRUCTIVE POSSESSION OF A THING, POSSESSION THEN MAY BE SAID TO BE JOINT.

NOW, WHEN YOU READ THE INDICTMENT IN COUNT TWO YOU WILL NOTICE THAT IT CHARGES THAT THE DEFENDANT, ROYCE BADGER, AIDED AND ABETTED BY GREG JAMES, DID CERTAIN ACTS. NOW, THE PURPOSE OF THIS CHARGE IS TO EXPLAIN TO YOU WHAT THE TERM AIDING AND ABETTING MEANS. THE GUILT OF A DEFENDANT

IN A CRIMINAL CASE MAY BE PROVED WITHOUT EVIDENCE THAT HE PERSONALLY DID EVERY ACT INVOLVED IN THE COMMISSION OF THE CRIME CHARGED. THE LAW RECOGNIZES THAT ORDINARILY ANYTHING A PERSON CAN DO FOR HIMSELF MAY ALSO BE ACCOMPLISHED THROUGH DIRECTION OF ANOTHER PERSON AS AN AGENT OR BY ACTING TOGETHER OR WITH THE DIRECTION OF ANOTHER PERSON OR PERSONS IN A JOINT EFFORT. IF THE ACTS OR CONDUCT OF AN AGENT, EMPLOYEE OR OTHER ASSOCIATE OF THE DEFENDANT ARE WILLFULLY DIRECTED OR AUTHORIZED BY THE DEFENDANT AND IF THE DEFENDANT AIDS AND ABETS ANOTHER PERSON BY WILLFULLY JOINING TOGETHER WITH THAT PERSON IN THE COMMISSION OF A CRIME, THEN THE LAW HOLDS THE DEFENDANT RESPONSIBLE FOR THE CONDUCT OF THE OTHER PERSON JUST AS THOUGH THE DEFENDANT HAD ENGAGED IN THE CONDUCT HIMSELF.

HOWEVER, BEFORE ANY DEFENDANT CAN BE HELD CRIMINALLY RESPONSIBLE FOR THE CONDUCT OF OTHERS, IT IS (Begin Record, p. 65) NECESSARY THAT THE DEFENDANT WILLFULLY

ASSOCIATE HIMSELF IN SOME WAY WITH THE CRIME AND WILLFULLY PARTICIPATE IN IT. MERE PRESENCE AT THE SCENE OF A CRIME AND EVEN KNOWLEDGE THAT A CRIME IS BEING COMMITTED, ARE NOT SUFFICIENT TO ESTABLISH THAT A DEFENDANT EITHER DIRECTED OR AIDED AND ABETTED THAT CRIME. YOU MUST FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS A WILLFUL PARTICIPANT AND NOT MERELY A KNOWING SPECTATOR.

NOW, ALSO THE LAW PERMITS THE JURY TO FIND THE DEFENDANT GUILTY OF ANY LESSER OFFENSE WHICH IS NECESSARILY INCLUDED IN THE CRIME OF POSSESSION WITH INTENT TO DISTRIBUTE AS CHARGED AGAINST THE DEFENDANT IN COUNT TWO OF THIS BILL OF INDICTMENT WHENEVER SUCH A COURSE IS CONSISTENT WITH THE FACTS FOUND BY THE JURY FROM THE EVIDENCE IN THE CASE AND WHAT THE LAW IS AS GIVEN YOU IN THESE INSTRUCTIONS.

NOW, IF YOU SHOULD FIND THAT THE DEFENDANT IS NOT GUILTY OF THE CRIME OF POSSESSION WITH INTENT TO DISTRIBUTE AS CHARGED IN COUNT TWO OF THE INDICTMENT,

THEN YOU COULD PROCEED TO DETERMINE THE GUILT OR INNOCENCE OF THE ACCUSED AS TO ANY LESSER OFFENSE WHICH IS NECESSARILY INCLUDED IN THE CRIME CHARGED. THE CRIME OF POSSESSION WITH INTENT TO DISTRIBUTE, WHICH IS CHARGED IN THE INDICTMENT IN THIS CASE, INCLUDES THE LESSER OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE, SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE. THE ESSENTIAL ELEMENTS OF A LESSER OFFENSE OF SIMPLE POSSESSION, (Begin Record, p. 66) AND THE GOVERNMENT MUST PROVE THESE OFFENSES BEYOND A REASONABLE DOUBT, ARE THIS: FIRST, THAT THE DEFENDANT POSSESSED COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE, AND, SECOND, THAT THE DEFENDANT DID SO KNOWINGLY AND INTENTIONALLY. THE GOVERNMENT MUST PROVE THOSE BEYOND A REASONABLE DOUBT.

NOW, ANY VERDICT THAT YOU RENDER IN THIS CASE MUST BE UNANIMOUS. THAT IS THE 12 OF YOU THAT WILL DELIBERATE MUST AGREE UPON THE VERDICT. IT IS YOUR DUTY AND RESPONSIBILITY AS JURORS TO DISCUSS THE

CASE WITH ONE ANOTHER AND TO REACH A VERDICT IN THE CASE IF YOU CAN DO SO. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF AFTER A FULL CONSIDERATIONO OF ALL OF THE EVIDENCE IN THE CASE AND AFTER CONSIDERING AND DELIBERATING WITH OTHER MEMBERS OF THE JURY. WHILE YOU ARE DISCUSSING THIS CASE, IF THE NEED BE, DO NOT HESITATE TO RE-EXAMINE YOUR OWN OPINION AND VIEWS AND CHANGE YOUR MIND IF YOU FEEL THAT IS NECESSARY. HOWEVER, I CAUTION YOU THAT YOU ARE NEVER ASKED AND YOU SHOULD NEVER GIVE UP A(N) HONEST BELIEF SOLELY BECAUSE YOU WANT TO GET A CASE OVER WITH OR SOLELY FOR THE PURPOSE OF MAKING A VERDICT. YOUR INTEREST IN THIS IS SEEKING THE TRUTH AND NOTHING MORE IN RENDERING A JUST VERDICT IN THE CASE IRRESPECTIVE OF WHAT THAT VERDICT IS.

I WANT TO CAUTION YOU THAT IF I HAVE SAID OR DONE ANYTHING IN THIS CASE OR COMMENTED IN ANY WAY THAT MIGHT MAKE (End of Record page)

(HANDS RAISED)

THE COURT: WHEN YOU COME BACK FROM LUNCH, THE MARSHAL WILL TAKE THE ALTERNATES OVER TO THE SPARE JURY ROOM. AND SEE IF WE WILL NEED THEM THIS AFTERNOON, AND THEN WHEN YOU GET BACK WE WILL SEND OUT THE EXHIBITS AND SO FORTH AND YOU CAN START YOUR DELIBERATION.

IF YOU WILL TAKE THEM BACK, MARSHAL. LET'S MAKE ARRANGEMENTS TO TAKE THEM TOGETHER TO LUNCH AND I'LL GET YOU IN THE PROPER ORDER. ALL RIGHT, YOU MAY GO TO THE JURY ROOM.

(WHEREUPON, THE JURY RETIRED AT 12:40 P.M.)

THE COURT: I'LL TAKE EXCEPTIONS WHEN WE GET BACK FROM LUNCH IN ONE HOUR IF YOU GOT ANY.

MR. MALOOF: I HAVE TWO OR THREE, JUDGE, THAT IS IT.

MS. HOWARD: (sic) IS THE GOVERNMENT GOING TO EXCEPT TO ANYTHING?

MS. HOWARD: NO.

MR. MALOOF: I COULD DO MINE IN TWO MINUTES.

THE COURT: ALL RIGHT, GO AHEAD. I'LL LET YOU DO THEM NOW AND GET THEM OVER WITH.

MR. MALOOF: THE FIRST EXCEPTION, YOUR HONOR, IS THAT YOUR HONOR DID NOT CHARGE THEM ON CIRCUMSTANTIAL EVIDENCE. YOU DEFINED IT BUT DID NOT CHARGE THEM THAT THE LAW OF CIRCUMSTANTIAL EVIDENCE SAYS THE GOVERNMENT MUST EXCLUDE EVERY REASONABLE HYPOTHESIS SAVE THE GUILT OF THE ACCUSED.

(Begin Record, p. 70) THE END OF YOUR CHARGE ON ENTRAPMENT, EVERYTHING ON THE ENTRAPMENT CHARGE I THOUGHT YOUR HONOR WAS CORRECT EXCEPT WHEN YOU TOLD THEM AT THE END IN YOUR OWN WORDS WHAT YOU THOUGHT ENTRAPMENT WAS AND YOU DID NOT AGAIN REFER TO REASONABLE DOUBT WHICH WAS THE MAJOR ELEMENT OF THAT CHARGE.

AND FINALLY, THIRDLY, WITH RESPECT TO THER CONSPIRACY CHARGE, AS I UNDERSTAND THE LAW, THE CONSPIRACY WOULD HAVE TO HAVE ENDED WHEN JAMES BECAME A GOVERNMENT

AGENT. THAT IS ROYCE BADGER DID NOT CONSPIRE WITH JAMES AFTER HE BECAME AN AGENT OF THE GOVERNMENT THAT IS AND I BROUGHT OUT IN EVIDENCE ON THREE OCCASIONS THAT JAMES BECAME AN AGENT FOR THE GOVERNMENT SOMETIME ON THE 13TH OR 14TH AND THAT THE CONSPIRACY MUST HAVE ENDED BEFORE THAT POINT AND FINALLY, YOUR HONOR, THE FACT THAT MY REQUEST TO CHARGE THAT I GAVE YOUR HONOR, I THINK IT IS EITHER 49 OR 50.

THE COURT: 49.

MR. MALOOF: 49, THAT UNDER THE FACTS OF THIS CASE, BASED ON THE INDICTMENT, THE DEFENDANT WOULD BE ENTITLED TO HAVE THE JURY MAKE A DETERMINATION AS TO THE AMOUNT OF COCAINE INVOLVED BOTH IN THE CONSPIRACY COUNT AND THE SUBSTANTIVE COUNT IF THEY WERE TO FIND HIM GUILTY, MAINLY BECAUSE HE HAS A RIGHT TO TRIAL BY JURY ON THE FACTS AS ALLEGED IN THIS CASE WHERE THE DEFENDANT HAS ADMITTED TWO-AND-ONE-HALF WEEKS PREVIOUSLY OF OBTAINING A HALF OUNCE OF COCAINE FROM GREG JAMES. IF THE JURY FOR SOME REASON WERE (Begin Record, p. 71)

TO TRY AND FIND HIM GUILTY ON THAT, THEY SHOULDN'T, BUT IF THEY DID, THEN THE DEFENDANT WOULD BE ENTITLED TO HAVE THE JURY STATE IT WAS BASED ON A HALF OUNCE. UNDER THE NEW SENTENCING GUIDELINES, THAT WOULD MAKE A HUGE DIFFERENCE IN THE AMOUNT OF TIME HE HAS TO SERVE, AND SO WE COULD GET A JURY VERDICT WHERE THEY MIGHT, FOR EXAMPLE, FIND HIM GUILTY ON THAT AND WE WOULD NEVER KNOW IT. SO I THINK HE WOULD BE ENTITLED UNDER THE CONSTITUTION TO HAVE THE JURY MAKE THAT DETERMINATION(.)

THE COURT: YOU ARE MAKING THAT EXCEPTION ON THE ASSUMPTION THAT THE NEW SENTENCING GUIDELINES WILL BE APPLIED BY THE COURT IN THIS CASE ASSUMING THERE IS A VERDICT OF GUILTY?

MR. MALOOF: THAT IS CORRECT, YOUR HONOR. IF THE NEW SENTENCING GUIDELINES ARE APPLIED, THE DEFENDANT WOULD BE ENTITLED TO HAVE THAT OPPORTUNITY.

THE COURT: ALL RIGHT. I'LL NOTE YOUR EXCEPTIONS.

NOW WE HAVE 55 MINUTES LEFT. BACK UP

HERE THEN I WANT YOU TO GO THROUGH THE EXHIBITS THEN AT THAT TIME WITH MR. POPE TO MAKE SURE THE RIGHT ONES GET OUT AND ALL YOUR EXHIBITS GET OUT. UNLESS THEY ASK FOR IT, I'M NOT GOING TO SEND THOSE PACKS OF -- THAT COCAINE OUT.

MR. MALOOF: I DON'T HAVE ANY OBJECTION TO THAT.,

THE COURT: IF THEY ASK FOR IT THEY ARE ENTITLED TO HAVE IT, BUT I PREFER NOT TO HAVE THAT STUFF OUT THERE. I (End of Record Page)

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA	)	
	)	Docket
VS.	)	#CR88-177A
	)	Superseding
ROYCE BODDIE BADGER	)	

PRESENTENCE REPORT

Prepared For:	The Honorable Robert L. Vining, Jr. United States District Judge
Prepared By:	Thomas W. Bishop United States Probation Officer (404) 968-0286
Sentencing Date:	August 15, 1988
Offense:	Count 1: Conspiracy to Possess Cocaine with Intent to Distribute. 21 USC 846.
Penalty:	Maximum 40 years and/ or a $2,000,000 fine.
Plea:	None. Jury verdict of guilty to Count 1 on 6/13/88.
Release Status	Released on 3/21/88 after posting a $50,000.00 property bond.

Identifying Data:

Date of Birth:	January 17, 1964
Social Security Number:	265-43-3373

Address:	880 Fox Chase Lane Riverdale, Georgia 30296
F.B.I. Number:	19397HA5
U.S. Marshal Number:	38891-019
Detainers:	None
Codefendants:	None
Assistant U.S. Attorney	Defense Counsel
Candice Howard 1854-B U.S. Courthouse 75 Spring Street, S.W. Atlanta, Georgia 30303 (404) 331-5816	Mike Maloof 215 North McDonough Street Decatur, Georgia 30030 (404) 373-8000
Date Report Prepared:	July 13, 1988

(BADGER, Royce Boddie Page 1)

PART A THE OFFENSE

Charge(s) and Conviction(s)

1. On 6/13/88 the defendant was found guilty by jury of Count 1 of a 2 Count Indictment.

2. Count 1 charges that from March 9, 1988, to March 14, 1988, Badger and Greg James conspired to possess cocaine with intent to distribute. This was in violation of 21 U.S.C. 846.

Related Cases

3. None.

(Presentence Report, p. 1)

The Offense Conduct

4. On 3/13/88 Greg James was arrested by the Georgia State Patrol in Randolph County, Georgia for speeding and driving without license. After he was arrested and placed in jail, his vehicle was searched and found in the trunk were 4 kilograms of cocaine in a red cosmetic case. Lab reports reflect that the net weight was 3.986 kilograms of 95% pure cocaine. James agreed to cooperate with the Drug Enforcement Administration and informed them that he had been hired by Royce Badger to deliver the cocaine from Miami. He was to receive $3,000.00 for the delivery of the cocaine when he arrived, after having received an earlier payment of $2,000.00.

5. According to reports a vehicle was rented in Atlanta by an individual named Dwan Von Siegal Kornegay on 3/9/88. The car was driven to Miami, Florida for James to use for the delivery of the 4 kilograms of cocaine to Atlanta. Once he arrived in Atlanta, he was to phone Badger.

6. James phoned Badger on 3/14/88 to set up a meeting at Williams Seafood Restaurant in College Park. Surveillance agents observed two men identified as Dwan Von Siegel Kornegay and Royce Badger drive up in a 300 ZX. After the vehicle was parked, Kornegay and Badger exited the vehicle and met with James inside the restaurant. All three were witnessed leaving together. While Kornegay got into the 300 ZX, Badger and James walked to the rental car, opened the trunk, and Badger took a red cosmetic case out and walked back towards the 300 ZX.

Agents then converged and arrested Kornegay and Badger. At the time of the arrest Badger was in possession of a .9mm semi-automatic pistol. He tossed it under the 300 ZX.

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7. It should be noted that the original 4 kilograms of cocaine in the red cosmetic case had been replaced with "sham" packages, and a small amount of cocaine from the original package was extracted and used in the controlled delivery. All packages were recovered at the time of arrest. Furthermore, prior to James entering the seafood restaurant, he was searched. No monies or contraband was found. After the meeting with Badger and Kornegay, James was again searched and found was $4,220.00 in currency. James states this money had been received from Badger as payment for the delivery of the cocaine.

8. Badger was indicted for Count 1: Conspiracy to Possess Cocaine with Intent to Distribute; and Count 2: possession of Cocaine with Intent to Distribute. On 6/13/88 he was found guilty as to Count 1 and not guilty as to Count 2. Kornegay was never indicted and is still under investigation. James pled guilty in Randolph County, Georgia, Superior Court and received a ten (10) year prison sentence for the offense of trafficking in cocaine.

Adjustment for Obstruction of Justice

9. No obstruction.

Adjustment for Acceptance of Responsibility

10. Badger denies any conspiracy to possess the 4 kilograms of cocaine and does not accept responsibility for the offense.

Offense Level Computation

11. Count 1: Conspiracy to Possess Cocaine with Intent to Distribute. Base Offense Level: The Guidelines for 21 U.S.C. 846 is found in Section 2D1.4(a) of the Guidelines, titled Attempts and Conspiracies. That section provides that conspiracies involving controlled substances shall have the same offense level as if the object of the conspiracy or attempt had been completed. The conspiracy was possession with intent to distribute 3.98 kilograms of cocaine and can be found in Section 2D1.1(a)(3) of the Guidelines, which is titled Unlawful Manufacturing, Importing, Exporting, or Trafficking (including possession with intent to commit these offenses). The drug quantity table reflects that if the amount of cocaine falls between 3.5 kilograms and 4.9 kilograms, he is to have a base level of 30. 30

12. Specific Offense Characteristics: Under 2D1.1(b)(1), if a firearm or other dangerous weapon is possessed during commission of the offense, he is to receive a 2 level enhancement. At the time of his arrest, Badger was in possession of a 9.mm semi-automatic pistol. +2

13. Adjust for Role in the Offense: None. 0

14. Victim related adjustment: no victim. 0

(BADGER, Royce Boddie Page 3)

15. Adjustment for Obstruction: None. 0

16. Adjusted Offense Level: 32

17. Adjustment for Acceptance of Responsibility: None 0

18. Total Offense Level 32

PART B THE DEFENDANT'S CRIMINAL HISTORY

19. No record.

Criminal History Computation

20. The total criminal history points is 0. According to the sentencing table (Chapter 5, Part A), 0 points establishes a criminal history category of I.

21. Career offender/criminal livelihood does not apply.

Other Criminal Conduct

22. None.

Pending Charges

23. None.

PART C SENTENCING OPTIONS

CUSTODY

24. Statutory Provisions: maximum term of imprisonment is 40 years.

25. Guideline Provisions: Based upon a total offense level of 32 and a criminal history category of I, the guideline range is 121-151 months.

SUPERVISED RELEASE

26. Statutory Provisions: 3 years.

27. Guideline Provisions: 3 years.

PROBATION

28. Statutory Provisions: Not eligible.

29. Guideline Provisions: Not eligible.

PART D OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities, and Community Ties

30. Royce Boddie Badger was born January 17, 1964, in Jacksonville, Florida, the second of three children born to the union of Dr. Soloman Badger, III, and Joyce Badger Jefferson. His father has been employed with Florida Junior College as a counselor since 1970. His mother, who resides in Decatur, Georgia, is employed by Macy's. They divorced in 1978 when the defendant was 14 years of age. All three boys resided with the father up through high school. Once in high school, the subject lived back and forth with his mother and father. In 1984 Badger moved to Tallahassee, Florida to attend Florida A&M. In 1986, after Badger dropped out of school, he moved to Atlanta, Georgia, and has lived in the metro area since. Both parents have remarried. Both of Badger's

brothers are students in college, one living in Tennessee, the other in Florida with his father. He also has two step-brothers arising from a relationship his father had previous to his first wife. This information was verified through interviews with subject's parents. His mother asked that it be noted that the defendant had a very difficult time with the divorce and it may have had a long term effect on him.

31. Badger has been married once, to Tina Marie Hill Badger on June 6, 1987, in Atlanta, Georgia. They have one child together, Royce, Jr., age one. Subject has two other children born out of wedlock. The oldest is Terry Fulton, age 5, who resides with her aunt in Florida. His other child, Alana Jones, age 2, resides in Vermont, under the guardianship of her maternal grandparents. Subject's spouse is employed with VFW as a telephone solicitor. Badger's wife was interviewed and the above information was verified.

Mental and Emotional Health

32. The defendant denies any prior mental health counseling or treatment. His mother reports he received short term counseling after she and his father divorced.

Physical Condition, Including Drug Dependence and Alcohol Abuse

33. Badger reports he is in good physical condition, never having had a serious accident or illness. He reports that he has both an alcohol and drug problem. He states he first used drugs in 4th or 5th grade, when he started smoking marijuana. He progressed to cocaine in high school and started

free-basing cocaine in college. He stated he last used cocaine in April, and last used marijuana a few days prior to the interview, which occurred on June 15, 1988. As to alcohol, he reports his first use was in high school. He states he has now acquired a taste for it and drinks daily. He has never had treatment but feels he is in need of it.

Education and Vocational Skills

34. The defendant graduated from Terry Parker High School in Jacksonville, Florida in 1982, after taking a G.E.D. test in the 12th grade to enter college early. He then entered Florida Junior College for two years. He earned an Associate of Arts degree. In 1984 he entered Florida A&M. He attended for 2 years and withdrew in 1986 after his girlfriend got pregnant. Badger maintained good grades through high school and up to his last two semesters in college, at which time his grades dropped. He states drinking, drugs, fraternity life, and the pregnancy of his girlfriend, brought his grades down. The above information was verified.

Employment Record

35. Badger reports he is currently a self-employed Jack of all Trades, and has been since January, 1987. He earns his income by painting, putting up fences, and general construction work. He reports an average monthly income of $1,500.00. Prior to January, 1987, he states he was employed with "Bug Killers" as an

exterminator. This is a company that he and a friend started in college and moved it to Atlanta. He states he earned approximately $700.00 a month while it operated. He stated they closed the business in 1987 and his friend took all the chemicals with him.

PART E FINES AND RESTITUTION

Statutory Provisions

36. Count 1: $2,000,000 maximum fine.

37. A $50.00 special assessment is mandatory.

38. Victim Impact Statement: No victim involved.

Guideline Provisions

39. Count 1: $17,500 to $175,000.

40. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. Section 5E4.2(i). The most recent advisory from the Administrative Office of the U.S. Courts, dated March 15, 1988, suggests that a monthly cost of $1,221.00 be used for imprisonment and a monthly cost of $83.33 for supervision.

Defendant's Ability to Pay

41. The following outlines Badger's financial situation:

ASSETS

Cash on hand	$ 500.00
Savings Account	$ 759.00
Checking Account (Commercial)	$ 466.00
Checking Account (Personal)	$ 140.00
*Home (Market Value)	$70,000.00
1976 Ford Pickup	$ 1,000.00
1987 Ford Bronco II	$15,000.00
1964 Thunderbird boat	$ 800.00
1981 Yamaha Motor-cycle	$ 1,800.00
Wedding Bands	$ 1,800.00
Jewelry-Gold Chains	$ 300.00
Total Assets	$92,565.00

LIABILITIES

*Balance of mortgage	$59,700.00
Loan Balance on Ford Bronco II	$20,024.00
Florida Federal School Loan	$ 3,700.00
Grady Hospital (Child Delivery)	$ 200.00
Credit Cards:	
1. Amoco Oil	$ 185.00
2. Discover Card	$ 633.00
3. Sears	$ 1,200.00
Total Liabilities	$85,642.00

NET ASSETS $6,923.00

MONTHLY INCOME

Defendant's Income	$1,500.00
Spouse's Income	$ 500.00
Total Income	$2,000.00

MONTHLY EXPENSES

Citicorp Mortgage Payment	$ 669.00
GMAC Truck Payment	$ 465.00
Credit Card Payments	$ 100.00
Utilities	$ 153.00
Groceries	$ 250.00
Insurance (Auto/ Health)	$ 175.00
Transportation	$ 60.00
Medical	$ 30.00
Child Support (When Able)	$ 50.00
School Loan	$ 50.00
Total Expenses	$2,002.00

NET INCOME ($2.00)

On 5/24/88 the Government seized Badger's home as a result of the current offense. The current status of the seizure is unknown.

42. As to Badger's adjusted gross income, the I.R.S. reports the following:

1984 - did not file
1985 - did not file
1986 - did not file
1987 - has not filed

43. The defendants past financial picture is clouded since he failed to file income tax, and since his income from Bug Killer could not be verified. Despite his monthly income and expenses coming out equal, his assets, if sold, should enable him to pay a fine if ordered to do so.

PART F FACTORS THAT MAY WARRANT DEPARTURE

44. None.

Respectfully submitted,

(signature of Thomas W. Bishop)

THOMAS W. BISHOP
U.S. Probation Officer

Reviewed and Approved:

(signature of William R. Williamson)
William R. Williamson
Supervising U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

The Probation Officer certifies that the Presentence Report, including any revision thereof, has been disclosed to the defendant, his attorney, and the counsel for the Government, and that the content of the Addendum has been communicated to counsel. The Addendum fairly states any objections they may have.

OBJECTIONS

By the Government

The Government has no objections.

By the Defense

The defense objections all center on the amount of cocaine involved in the conspiracy. The defense states in paragraph 12 of the objections that, based on a verdict of not guilty on Count 2 and several facts that are outlined in their objections, the only amount of cocaine involved in the conspiracy is the 1/2 ounce of cocaine that Badger admitted to having purchased from James prior to his arrest.

Also under paragraph 12, the defense objects to the probation officer's denial of a 2 level decrease for Acceptance of Responsibility. He states Mr. Badger does admit to the 1/2 ounce of cocaine, which they believe was the amount involved in the conspiracy.

In the last section of paragraph 12 the defense lists his computations based on 1/2 ounce of cocaine and Badger having received a 2 level decrease for Acceptance of Responsibility. He lists Badger's base at 10, gives him a 2 level increase for having a weapon, and a 2 level decrease for

Acceptance of Responsibility, thus giving him a Total Offense Level of 10. He states his guidelines sentencing range would then be 6-12 months.

The Probation Officer still finds the amount of cocaine involved in the conspiracy to be 4 kilograms. This is based on the following factors:

1. The investigation was based on the arrest of Gregory James for possession of 4 kilograms of cocaine on March 13, 1988. After his arrest James agreed to tell the agents who he was to deliver it to and agreed to follow through and deliver it to Badger. At the time of Badger's arrest, according to the agent, he admitted to having known that the cosmetic case was carrying 4 kilograms of cocaine, but he stated he was just holding it for James, even though he later denied it in testimony before the Court.

(Addendum, page 2)

2. The indictment was then initiated, based on the delivery and arrest of Badger.

3. The D.E.A. agents were not aware of the 1/2 ounce of cocaine that Badger admits to having purchased from James prior to the arrest.

4. According to the A.U.S.A., Candice Howard, the trial centered on the 4 kilograms and not the 1/2 ounce which the defendant admitted to having purchased from James.

Therefore, based on 4 kilograms and possession of a weapon, he would have a

total Offense Level of 32. Since he denies the 4 kilograms, he would not receive a 2 level decrease. His guideline range is 121-151 months.

CERTIFIED BY

(signature of Thomas W. Bishop)
THOMAS W. BISHOP
U.S. Probation Officer

REVIEWED & APPROVED BY:

(signature of William R. Williamson)
William R. Williamson
Supervising U.S. Probation Officer

STATE OF GEORGIA

COUNTY OF DEKALB

AFFIDAVIT OF SERVICE

I, W. Michael Maloof, depose and say that I am an the attorney of record for Royce Boddie Badger, the petitioner herein, and that pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the attached, corrected Petition for Writ of Certiorari on each of the parties required to be served herein, as follows:

On The United States of America, respondant herein, by depositing three copies for shipment by overnight carrier, in a duly addressed envelope, with shipping fees prepaid, to Candiss L. Howard, Assistant U.S. Attorney, counsel of record for The United States of America, located at 1800 United States Courthouse, 75 Spring St. S.W., Atlanta,

Georgia 30303, on September 15, 1989.

On The United States of America, respondant herein, by depositing for shipment by overnight carrier, three copies in a duly addressed envelope, with shipping fees prepaid, to the Solicitor General at his office at Dept. of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, on September 15, 1989.

All parties required to be served have been served.

W. MICHAEL MALOOF

Sworn to and subscribed
before me this 15th day
of September, 1989.

No. _____

IN THE UNITED STATES SUPREME COURT
October Term 1988

ROYCE BODDIE BADGER,
Petitioner
vs.
UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOTICE OF APPEARANCE

To: Clerk of the Supreme Court of the United States

You are hereby requested to enter my appearance as counsel for Royce Boddie Badger, petitioner in the above-entitled action.

Dated this 15th day of September, 1989.

W. MICHAEL MALOOF
State Bar No. 468500

215 North McDonough Street
Decatur, Georgia 30030
(404) 373-8000

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Notice of Appearance by depositing said copies to be shipped by expedient carrier, postage-paid and addressed as follows:

Candiss L. Howard (3 copies)
Assistant U.S. Attorney
1800 United States Courthouse,
75 Spring St. S.W.
Atlanta, Georgia 30303

United States Solicitor General
(3 copies)
Department of Justice
10th and Constitution Avenue, NW
Washington, D.C. 20530

This 15th day of September, 1989.

W. MICHAEL MALOOF